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NOTES

SURETYSHIP—PAROL PROMISE OF INDEMNITY.—Perhaps no question in the law of guaranty has given rise to more confusion than that of the applicability of the statute of frauds to the case of a defendant's parol promise to indemnify another for becoming surety for a third. The English decisions on this point abound in subtle distinctions and conflicting conclusions; the modern doctrine in that country seems to favor the exclusion of such a promise from the operation of the statute as not being one "to answer for the debt, default, or miscarriage of another." And this is the view which obtains in the majority of American jurisdictions, though our decisions are in hopeless conflict. The reasons given for taking the one position or the other are widely diverse, and many of those courts which apply the English rule have avoided any discussion of principle, contenting themselves with a reference to the broad statement of BAYLEY, J., in *Thomas* v. *Cook* (1828) 8 B. & C. 728: "A promise to indemnify does not fall within either the words or the policy of the statute of frauds."

This question came before the Court of Errors and Appeals of New Jersey in the recent case of *Hartley* v. *Sandford* (1901) 50 Atl. 454. The plaintiff, having become surety for the defendant's son at the father's request, brought suit upon the latter's promise of indemnity, but recovery was denied because the promise was not evidenced by writing. The court found but one of its own decisions bearing on the point in question; in *Apgar's Adm'rs* v. *Hiler* (1854) 24 N. J. Law, 812, the parol promise was between two persons who signed a note as sureties for a third signer, and it was held that the statute did not apply. The court, however, contends that in the latter case the promise was really to pay the promisor's own debt to his co-surety, while in the former the defendant's en-

gagement was to answer for the debt of a third party, the promisor being under no obligation to the promisee other than that incurred by the promise of indemnity. And on this ground the decision is based. The leading case of *Thomas* v. *Cook*, *supra*, involved a promise to a co-surety, as did *Apgar's* case, and recovery was allowed, but in *Green* v. *Cresswell* (1839) 10 A. & E. 453, where the statute was applied, there was no relation of co-suretyship. These two cases have been said to be distinguishable on the ground taken in the principal case. *Green* v. *Cresswell*, however, is generally considered to have been over-ruled by modern holdings. The alleged distinction seems, at best, of doubtful validity, for, where the promise is made to one who becomes a co-surety, as well as in the other case, the promisor enters into an engagement which he would not enter into but for the purpose of assisting the third party; and he would be under no obligation to contribute, as co-surety, except for the relationship which he established in order that he might secure credit for the debtor.

The "debt of another" of the statute must be one due the promisee. It is asserted that in these cases of indemnity the debt which the defendant engages to discharge is that implied obligation of the third party to the promisee which arises on the making of the parol promise, but it may well be doubted whether the statute was intended to include in its operation an obligation of a third person which exists or is to exist solely by virtue of and as incidental to the special contract which the plaintiff seeks to enforce. Browne, St. Fr. (5th ed.) § 162.

In the principal case the court considered itself free to take either position; in holding the defendant's promise an engagement to answer for the debt of another within the meaning of the statute, it seems to have disregarded the modern principle of construction of that statute.

LIABILITY TO THIRD PERSONS FOR INJURIES RESULTING FROM A BREACH OF CONTRACT.—It often happens that one of two contracting parties so negligently performs his contract that a third person who is not a party to the contract, is injured. The question whether such third person may or may not maintain an action against the one who committed the breach has given much concern to the courts of both England and the United States. In a leading English case, *Winterbottom* v. *Wright* (1842) 10 Mees. & W. 109, the defendant had contracted with the postmaster-general to provide a mail coach for carrying the mail bags, and to keep the coach in repair and fit for use. Other persons had contracted with the postmaster-general to supply horses and driver for the coach. The coach broke down and the driver was injured by reason of the defendant's failure to keep it in proper repair. The court held that the driver could not recover, on the ground that there was no privity of contract between the parties and hence no duty owing to the plaintiff by the defendant. "If the plaintiff can sue," said Lord ABINGER, C. B. (at p. 114), "every passenger, or even any person